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No. 94-1453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

D. GRANT PEACOCK,
Petitioner,
v.
JACK L. THOMAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE BRICKLAYERS & TROWEL TRADES INTERNATIONAL PENSION FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

IRA R. MITZNER
Counsel of Record
WOODY N. PETERSON
CARLA M. MARCOLIN
DICKSTEIN, SHAPIRO & MORIN, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700
Attorneys for Amicus Curiae Bricklayers & Trowel Trades International Pension Fund

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INTEREST OF THE AMICUS CURIAE [1]

The Bricklayers & Trowel Trades International Pension Fund ("IPF") is a multiemployer ERISA[2] plan providing

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

[2] Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.*

pension benefits to workers involved in various construction trades, including bricklaying. The benefits distributed by the IPF are funded by contributions of participating employers, which make such contributions pursuant to the terms of collective bargaining agreements between them and Bricklayer local unions [3] throughout the country. When an employer fails to make required contributions to the IPF, ERISA requires the IPF trustees to make "reasonable," "systematic" and "diligent" efforts to collect those delinquencies.[4]

A significant obstacle faced by the IPF and other Taft-Hartley funds [5] is the abuse of the corporate form by employers in order to place corporate assets beyond the reach of the funds. The IPF has a substantial interest in insuring that when employers attempt to evade their ERISA obligation to pay employee benefit contributions, by ignoring corporate formalities or otherwise perpetrating a fraud upon the beneficiaries of the fund, it continues to have available in ERISA cases the traditional doctrine of "piercing the corporate veil." [6]

INTRODUCTION

A. The IPF And Other Taft-Hartley Plans

The IPF is an ERISA fund administered in Washington, D.C. with over 15,000 participating construction industry employers nationwide. It distributes $40 million each year to over 16,000 beneficiaries. The IPF, like all Taft-Hartley plans, is governed by an equal number of union-

[3] There are 175 such local unions that negotiate collective bargaining agreements.

[4] 41 *Fed. Reg.* 12,740 (1976) (PTE Class Exemption 76-1).

[5] 29 U.S.C. § 186(c)(5).

[6] In light of the IPF's keen interest in the veil piercing issues raised by the second question presented by the Petition for Certiorari, and the IPF's answers to that question, this brief does not address the ancillary jurisdiction question presented by the Petition.

appointed and employer-appointed trustees. There are approximately three million Taft-Hartley pension plans like the IPF,[7] with total assets of approximately $250 million.[8]

B. Congress Puts "Teeth" In ERISA

At the time ERISA was passed in 1974, there were no special provisions addressing collection of employer delinquencies. This problem was (and is) particularly acute for funds like the IPF, many of whose contributing employers are small companies in the construction business, an industry which, as Congress has recognized, is notable for its transitory nature.[9]

Congress amended the statute in 1980 to increase the ability of funds to recoup delinquent contributions. The legislative history reflects that Congress intended that the collection enforcement provisions "should have teeth," because of the "serious problem" created by the failure of employers to "make promised contribution[s] in a timely fashion," which "imposes a variety of costs" on plans. *Carpenters Amended & Restated Health Benefit Fund v. John W. Ryan Constr. Co.*, 767 F.2d 1170, 1173-74 (5th Cir. 1985) (citations omitted).[10] Those

[7] 4 Office of Research & Economic Development, U.S. Dep't of Labor, *Private Pension Plan Bulletin—Abstract of 1991 Form 5500 Annual Reports* 21 (Winter 1995).

[8] AFL CIO, *Pensions in Changing Capital Markets* 50-51 (1993). This $250 million figure does not include the assets of an equal number of health, welfare and similar Taft-Hartley plans, located throughout the United States and faced with the same difficulties in collecting employer delinquencies as pension plans like the IPF.

[9] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1123 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989).

[10] Quoting staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 1076, *The Multiemployer Pension Amendments of 1980: Summary and Analysis of Considerations* 43-44 (Comm. Print 1980).

changes included adding section 515 of ERISA ("Every employer who is obligated to make contributions . . . shall . . . make such contributions . . . ."),[11] permitting funds to collect interest and liquidated damages up to 20% of delinquent contributions (or double interest) in court actions (29 U.S.C. § 1132(g)(2)(B) and (C)) and making the award of attorney's fees in favor of the plan *mandatory* in collection cases. 29 U.S.C. § 1132 (g)(2)(D).[12]

C. The Delinquency Problem Faced By Taft-Hartley Funds

The trustees of the IPF have adopted written collection procedures which insure that employers are given an initial opportunity to pay delinquent contributions and, if the delinquent sums are not collected, that the matters are then referred to counsel for action. In 1994, there were approximately 3,200 delinquent IPF employers, and 323 delinquencies in the hands of counsel, of which 86 ultimately had to be litigated. Section 502(e)(2) of ERISA (29 U.S.C. § 1132(e)(2)) provides that the IPF may institute all its collection cases in Washington, D.C. "where the plan is administered," regardless of where the participating employer is located. This provision enables the IPF to bring all such cases in its home judicial district, resulting in a great savings to the plan in court costs and a great tactical advantage in resolving delinquencies in the IPF's home forum.[13]

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[11] 29 U.S.C. § 1145 ("Delinquent Contributions").

[12] This is the only provision in all of ERISA with a mandatory attorney's fees requirement. In all other ERISA Title I actions, attorney's fees are only allowed in the "discretion" of the court. 29 U.S.C. § 1132(g)(1).

[13] Plans have been successful in defeating motions to transfer collection cases from the place where the plan is administered to the district where the employer is located. *See, e.g., Employees Sav. Plan of Mobil Oil Corp. v. Vickery*, 99 F.R.D. 138 (S.D.N.Y. 1983).

For trust funds such as the IPF, there is little difficulty in collecting from employers with ongoing operations. As to those employers, there are assets available for garnishment and execution in the event that they are unable or unwilling to satisfy the judgment. The real problem instead arises when those individuals who control the employer which signed the collective bargaining agreement abuse the corporate form, or loot the company after a judgment is entered. If the beneficiaries of the fund are to recover the contributions that are due on their behalf,[14] they must "pierce the corporate veil."

The doctrine of piercing the corporate veil has long been used by the IPF in ERISA cases to secure payment of employer delinquencies. It is a weapon that, while not frequently invoked (because of the difficulties of proof), is nonetheless an essential weapon in the IPF's arsenal to combat fraud by certain employers.

SUMMARY OF ARGUMENT

The question presented by this case is whether federal courts can continue to apply in ERISA cases the well-established doctrine of federal common law veil piercing to allow beneficiaries and funds to recover benefits due them under ERISA. This Court has consistently disregarded the corporate form and pierced the veil when required to prevent fraud or injustice or to avoid defeating legislative policies. The veil piercing doctrine is a broad "equitable principle," or a "qualification or denial" of the principle of limited liability. It is not, as the court below recognized, itself a "cause of action".

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[14] In the case of pension plans, ERISA requires the fund to provide the beneficiary with pension credits regardless of whether the contributions are recovered in the collection process. In the case of health and welfare plans, no such credit need be given and the employees lose medical coverage if the contribution is not made. Delinquencies therefore result in unanticipated costs to pension plans and the loss of medical benefits to those beneficiaries covered by health plans.

The federal common law of veil piercing has been uniformly recognized and applied by the courts of appeals in ERISA delinquency cases. The circuits have all adopted a parallel three-factor federal common law veil piercing test, which "demands a substantial showing" by a plaintiff that each factor is present. The Fourth Circuit properly applied this familiar test to respondent Thomas' evidence, which proved that Petitioner Peacock siphoned off the assets of Tru-Tech, a corporation he controlled, for his own personal benefit and to deny his employees the ERISA benefits Tru-Tech owed them. Given the difficulties of uncovering corporate machinations like Peacock's, and the substantial evidentiary burden a plaintiff must shoulder, affirmance of the judgment below will not open the litigation floodgates or expose corporate shareholders to unwarranted liability.

The decision below does not create a new "cause of action," ERISA remedy or category of persons subject to ERISA's liability, or otherwise run afoul of *Mertens v. Hewitt Associates,* —— U.S. ——, 113 S. Ct. 2063 (1993) and *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985). Once the court of appeals pierced Tru-Tech's corporate veil due to Peacock's abuse of the corporation, Peacock and Tru-Tech became "one for all purposes." *United States v. Lehigh Valley R.R.,* 220 U.S. 257, 272, 274 (1911). The court below properly found him liable under ERISA, not because he is an ERISA fiduciary in his own right, but because he *is* True-Tech, a conceded ERISA fiduciary.

Taft-Hartley plans faced such daunting problems collecting delinquent employer contributions that Congress amended ERISA in 1980 to give it even more "teeth." Against this background, reversal of the Fourth Circuit would take away a weapon ERISA plans had even before the 1980 amendments, and run counter to Congress' express intent to facilitate plan collections from delinquent employers, including those who loot their corporations.

Every court to have addressed the issue in an ERISA case has recognized the veil piercing doctrine, even those which, consistent with *Mertens,* have simultaneously rebuffed attempts to expand ERISA's definition of "employer" in order to reach corporate officers. Indeed, these decisions affirmatively, and correctly, find that to sanction corporate abuses like Peacock's in the ERISA context would thwart Congress' discernible intent.

Contrary to Petitioner's argument, state law cannot govern here. First, collection of employer delinquencies can only be brought in federal court. Second, because Peacock stands in the shoes of a fiduciary in breach, Thomas' second action clearly "relates to" an ERISA plan, and state law would be preempted by ERISA.

Under Peacock's theory, the veil piercing doctrine could be used in an ERISA case only if the corporate officer was brazen or witless enough to abuse the corporate form (and the beneficiaries or fund lucky enough to learn of the abuses) before an adverse judgment was entered against the corporation. If neither event occurred before judgment, the federal doctrine (and a federal forum) would be unavailable. But the availability of veil piercing in ERISA cases cannot turn on the fortuity of the timing of the "corporate strategies" employed by schemers like Peacock, if only because such a rule would reward those who are the cleverest and most sophisticated in the use of the veil to disguise their siphoning off of corporate assets.

Finally, reversal here would deprive Taft-Hartley and other ERISA funds of important procedural and tactical advantages Congress was careful to afford them, such as the right to sue employers in the district where the plan is administered, and to effect nationwide service of process. What Peacock advocates would not only strip away these statutory protections, but would also mean that every ERISA delinquency case involving veil piercing would be

brought in two states, in two forums and under two sets of laws—first in federal court (and under federal law) where the Plan is administered, and then, under state law, in whatever state the employer happened to be located. This patchwork of litigation, with its attendant expense and difficulty for the funds, is obviously desirable for corporate manipulators like Peacock (whose goal it is to cheat their employees out of ERISA benefits), but harmful to fund beneficiaries. Allowing Peacock to reach that goal in this fashion is contrary to the letter and the spirit of ERISA.

ARGUMENT

I. THE ORIGINS AND NECESSITY OF THE CORPORATE VEIL PIERCING DOCTRINE

Chief Justice Marshall observed nearly 200 years ago that a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 250, 303 (1819). The venerable doctrine of "piercing the corporate veil" is a necessary reality check on this legal fiction, and its attendant privilege of limited liability. As Professor Wormser (who apparently popularized the term "veil piercing") has written,

> [s]ince the element of personality is an extraordinary privilege conferred upon the corporation by the law, and involves the employment of a fiction, . . . "[the corporate form] must be used for legitimate business purposes and must not be perverted" . . . .

I. Maurice Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* 8-9 (New York: Baker, Voorhis & Co. 1927) (citation omitted). Accordingly,

> the fiction will be disregarded and the law will look to see the men and facts behind the fiction whenever it is employed "to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery and crime."

Id. at 40.

These doctrines are likewise firmly embedded in the jurisprudence of this Court, which has

> long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.

First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 629-30 (1983). *See also Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *Lehigh Valley*, 220 U.S. at 271-74.

Limited liability of corporations, then, is a privilege, just as the veil-piercing exception is a prophylactic limitation on that privilege. This exception has been variously termed an "equitable principle" (*First Nat'l City Bank*, 462 U.S. at 629), a "qualification or denial" of the principle of limited liability (*Anderson*, 321 U.S. at 362), an "exception" to the "rule" of limited liability (Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89 (1985)), a "doctrine" (*id.* at 109), or a "disregard" of the "fiction" of the corporate form (Wormser, *supra*, at 40). But an attempt to pierce the corporate veil

> *"is not itself a cause of action* but rather is a means of imposing liability on an underlying cause of action . . . ." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 603 (perm. ed. rev. vol. 1990).

Thomas v. Peacock, 39 F.3d 493, 499 (4th Cir. 1994) (emphasis added).

II. THE TEST FOR VEIL PIERCING IN ERISA CASES IS WELL-DEFINED AND DIFFICULT TO MEET

The doctrine of piercing the corporate veil has been applied by many courts in ERISA delinquency cases. As articulated in *Alman v. Danin*, 801 F.2d 1, 4 (1st Cir. 1986), relied upon by the court below (*Thomas*, 39 F.3d at 504), a court will look to three factors in determining whether to pierce the corporate veil: (1) the respect paid by the individuals to the corporate identity; (2) the fraudulent intent of the principals; and (3) the degree of injustice that would be visited on the litigants by recognizing the corporate identity. *Accord United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1092-93 (1st Cir. 1992) (Breyer, Selya and Cyr, JJ.). The other courts of appeals have adopted a substantially similar federal common law veil piercing test in ERISA cases. *See, e.g.*, cases cited in *id.; see also Operating Eng'rs Pension Trust v. Reed*, 736 F.2d 513, 515 (9th Cir. 1984) (Kennedy, J.).

That three-factor test "demands a substantial showing" by a plaintiff that each factor is present. *United Elec.*, 960 F.2d at 1092-93. To meet that burden, a litigant must prove, for example, that corporate formalities and independence were ignored (*Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir. 1984)); that an owner looted the company for the owner's personal benefit (*Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc.*, 872 F.2d 702, 705 (6th Cir. 1988)); that the firm had "wholly inadequate capitalization" (*Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1221 (2d Cir. 1987)); or that the owner abused the corporate form "in an inequitable fashion to avoid its obligations" (*Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan v. Hroch*, 757 F.2d 184, 191 (8th Cir. 1985)). The Fourth Circuit here did no more than apply this familiar test to Thomas' proof which, as the court of appeals

found (in a holding Peacock did not appeal to this Court), established that Peacock

> engaged in a "corporate strategy" with "the specific intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment."

Thomas, 39 F.3d at 505.

Permitting funds such as the IPF to continue to pursue unscrupulous individuals like Peacock will not subject officers and shareholders of legitimate corporations to wholesale imposition of ERISA liability. The "piercing" doctrine will continue to come into play only when a plaintiff makes a "substantial showing" that there has been a total disregard of the corporate form, or that the corporation has been converted into a vehicle to defraud beneficiaries. In (and only in) those circumstances, the perpetrators will be denied the protection of the corporate veil, not because there is an independent "cause of action" against them under a "piercing" theory, but because the wrongdoer is no longer entitled to the protection of the legal fiction of the corporate shield, and will be deemed to *be* the corporation and, as such, liable under ERISA for the payment of contributions.

III. THE UNIVERSALLY RECOGNIZED FEDERAL VEIL PIERCING DOCTRINE FOLLOWED BY THE FOURTH CIRCUIT IS CONSISTENT WITH ERISA AND THIS COURT'S TEACHINGS

Petitioner cites no case (because to our knowledge there is none) in which a court has refused to apply the veil piercing doctrine to any other federal statute. Peacock nonetheless argues that Congress chose ERISA as its first vehicle to forbid federal courts from piercing the corporate veil, thereby allowing abuses of the corporate form designed to evade ERISA obligations, to be remedied (if at all) in the state courts.

Petitioner never comes to grips with the fact that every court facing the issue has recognized that veil piercing is available in an appropriate ERISA breach of fiduciary duty case, as in all others. *See, e.g., Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 26-27 (1st Cir. 1988) (Breyer, J.); *United Elec.*, 960 F.2d at 1091-93; *Connors v. P & M Coal Co.*, 801 F.2d 1373, 1377-78 (D.C. Cir. 1986) (Scalia, Ginsburg, D. & Buckley, JJ.); *International Bhd. of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1547, 1550 & n.28 (D.C. Cir. 1988); *Hroch*, 757 F.2d at 190-91; *Laborers Clean-Up Contract Admin. Trust*, 736 F.2d at 523-25; *Solomon v. Klein*, 770 F.2d 352, 353-54 (3d Cir. 1985); *Laborers' Pension Trust Fund*, 872 F.2d at 704-05; *Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 35 F.2d 29, 36-37 (2d Cir. 1994).[15]

What is particularly instructive about this uniform body of appellate court precedent is that in every case where the question was presented, the court of appeals (consistent with *Mertens*) rejected attempts to expand the ERISA definition of "employer," while simultaneously recognizing that its refusal did not abrogate the doctrine of corporate veil piercing in an ERISA context. Indeed,

[15] We note at this juncture that Peacock cites *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995), as holding directly that "*Mertens* forbids any sort of relief . . . against nonfiduciaries for engaging in conduct not prohibited by ERISA" (Pet. Br. 17 n.8), and as providing indirect support for his proposition that ERISA's definition of a "fiduciary" specifies when the corporate veil may be pierced in an ERISA case. (Pet. Br. 19 & n.12.) The short answer to this citation is that here Peacock (by virtue of his corporate manipulation) stands in the shoes of Tru-Tech, which *is* a fiduciary and engaged in conduct which *is* prohibited by ERISA. Moreover (as Peacock's "Cf." signal candidly admits), *Compton* is not a fiduciary veil-piercing case but rather a "prohibited transaction" case brought under the much more technical requirements of 29 U.S.C. § 1106. If it had been a fiduciary veil piercing case, the Third Circuit would have applied the same federal veil piercing test used by the Fourth Circuit here. *See Solomon*, 770 F.2d at 353-54.

the circuit courts were at pains to emphasize that their holdings left the doctrine undisturbed. *See Massachusetts Laborers'*, 845 F.2d at 25-26; *International Brotherhood*, 856 F.2d at 1547, 1549-50; *Solomon*, 770 F.2d at 353-54; *Connors*, 801 F.2d at 1377-78.

What the District of Columbia Circuit said about the "hallmark corporate law" doctrine of limited liability in the ERISA context applies to the equally deep-rooted corporate law principle of piercing the corporate veil in ERISA cases:

> Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history. We may usefully recall what quite recently in *Connors v. P & M Coal Co.* we announced:
>
> "We find nothing in the language or purpose of [ERISA] to justify so significant a compromise of the corporate principle of limited liability. . . ."

International Brotherhood, 856 F.2d at 1550. Here, as in *International Brotherhood* and *Connors*, there is nothing in the "language or purpose" of ERISA which supports Petitioner's argument that the Act destroys the federal corporate veil doctrine. To the contrary, the text and intent of the statute affirmatively establish that Congress preserved the doctrine for use in federal court by ERISA beneficiaries and funds. *United Elec.*, 960 F.2d at 1091-93 (collecting cases). As the First Circuit there pointed out, "sanctioning conduct" abusive of the corporate form like that engaged in by Peacock here, would put the federal courts "at cross purposes with Congress and thwart Congress's discernible intent." *Id.* at 1092.

Petitioner (Pet. Br. 12, 14) argues that by applying the traditional doctrine of veil piercing, the Court of Appeals "expands" ERISA to include a federal "cause of action," contrary to this Court's admonition in *Mertens*, 113 S. Ct. at 2071. This proposition has twin, and independently

fatal, flaws. First, as we established in Part I, piercing the corporate veil is in no sense a "cause of action."[16] Rather, piercing the corporate veil simply stands the individual in the shoes of the corporation:

> When state law pierces the corporate veil, where the owner is the corporation's alter ego, where state or other relevant federal law makes the owner liable, it is fairly easy to say that the owner *is* the corporation, and that the owner is therefore an "employer" (under ERISA's definition) "who is obligated" (under state or other relevant federal law) "to make contributions to" a pension plan. Indeed, in such a case he is an employer *already obligated* . . . to make the contributions.

[16] To be sure, there are cases in which courts in dicta (or litigants) loosely use the phrase "cause of action" in reference to the veil piercing theory. *See, e.g., Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 460-63 (7th Cir.), *cert. denied*, 502 U.S. 939 (1991). This terminology does not alter the fact that, as the court below concluded, veil piercing is a substantive law "rule" that "determines *who* is liable for breaches of ERISA fiduciary duties." *Thomas*, 39 F.3d at 503. *See also id.* at 499, 500; *Lumpkin*, 933 F.2d at 460-61; *United Elec.*, 960 F.2d at 1092 and cases there cited. Finally, see Pet. Br. 15, 18, 26 (referring to veil piercing as a "standard" or "rule"). Nor does it mean that veil piercing is a new "cause of action" under *Mertens*, or a new "remedy" under *Russell*, 473 U.S. 134. In *Mertens* (in contrast to this case), because the defendant was concedely *not* a fiduciary, he could only have been found liable by expanding ERISA's definition to include a non-fiduciary, an expansion this Court found flew in the face of the text of ERISA. Similarly, in *Russell*, this Court rejected an attempt to add a new remedy to those Congress had deliberately chosen to incorporate in the statute.

By contrast, here, as we have shown, Congress explicitly made corporations that exercise fiduciary control part of the class of liable persons, and specifically included the remedy for fiduciary breaches Thomas seeks. 29 U.S.C. § 1109. Since it is undisputed in this Court that Peacock "is" his corporation Tru-Tech, it cannot be said that the judgment below "adds" anything to ERISA within the meaning of *Mertens* or *Russell*.

Massachusetts Laborers', 845 F.2d at 26 (emphasis in original). *See also Lehigh Valley*, 220 U.S. at 272, 274 (when corporate veil pierced, corporation and those behind veil become "one for all purposes" and are treated as "one and inseparable"); *Steinberg v. Buczynski*, 40 F.3d 890, 892 (7th Cir. 1994) (those who abuse corporate form deemed to "stand in the shoes of their corporation as debtors to the pension fund").

Second, Petitioner ignores the fundamental differences between this case and *Mertens*. Unlike *Mertens*, this case (and collection cases generally) do not involve the question of expanding the definition of "fiduciary" beyond the explicit categories enumerated in ERISA.[17] Rather, they raise the issue of who *in fact* is the corporate employer, a fictional entity ERISA on its face makes liable for the payment of contributions on behalf of its employees. *See Massachusetts Laborers'*, 845 F.2d at 24.[18] When, in an appropriate case, a court lifts the corporate veil and imposes liability on its controlling individuals or entities, it does not "expand" the class of liable persons. To the contrary, a court in that instance imposes liability on the

[17] Petitioner makes much of the fact that Thomas is attempting to pierce the corporate veil against Peacock when Peacock was found, in the first proceeding, not to be a fiduciary. In ERISA Taft-Hartley fund collection actions, the issue of whether the delinquent employer is a "fiduciary" never comes into play because an employer does not have discretion and control over fund assets (as required for fiduciary status under *Mertens*) and cannot gain such discretion and control because participating employers are "parties in interest" under ERISA. 29 U.S.C. §§ 1003(14), 1106. Consequently, the issue of fiduciary status is irrelevant under §§ 1132(g)(2) and 1145. Moreover, as we show *infra*, Petitioner's reliance on *Mertens* is misplaced even outside the Taft-Hartley collection context.

[18] The standards for piercing the corporate veil (respect for corporate identity, fraudulent intent, etc.) are different from those used to determine who is an ERISA fiduciary (discretionary control or authority over fund assets or management). *See, e.g., Thomas*, 39 F.3d at 503 n.14; 29 U.S.C. § 1002(21)(A); *Mertens*, 113 S. Ct. at 2066.

very persons who, *but for* the privilege of limited liability afforded by the legal fiction of the corporate form, would have been so liable *in the first place*.

Such a result is not only commanded by the text of ERISA, but also furthers the ERISA policies of keeping ERISA plans solvent and ensuring that unscrupulous corporate schemers like Peacock do not abuse the corporate form so as to deny ERISA beneficiaries the retirement benefits they have worked hard to earn. *See Ryan*, 767 F.2d at 1173. The response to Petitioner's contention that ERISA (alone in all the law) compels federal courts to allow the Peacocks of the corporate world to (in Professor Wormser's words) use the fiction of the corporate form to "defraud creditors" like ERISA beneficiaries, "evade existing obligations" to their employees, "circumvent a statute" such as ERISA, or to "protect knavery" akin to the corporate shenanigans Peacock concededly resorted to here, should be "not while this Court sits." *See Anderson*, 321 U.S. at 366-67; *Lehigh Valley*, 220 U.S. at 273-74.

IV. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO DEPRIVE ERISA PLANS OF A CRITICAL WEAPON IN EMPLOYER DELINQUENCY CASES

The problem of employer delinquencies was so acute and posed such an economic threat to the well-being of Taft-Hartley funds that in 1980, the statute was amended to give it "teeth." *See Ryan*, 767 F.2d at 1173-74. National funds like the IPF must chase thousands of delinquent employers every year. The most difficult delinquency cases do not involve employers with ongoing operations, but employers who are "here today and gone tomorrow." More and more, this phenomenon of the vanishing or insolvent employer is attributable to fraud rather than any economic malaise. In those instances when an employer has disregarded the corporate form in order to perpetrate a fraud on creditors, including the

fund, the doctrine of piercing the corporate veil has proven to be the only effective weapon.[19]

This is not a case in which beneficiaries or Taft-Hartley funds are asking the Court for expanded powers under ERISA. The doctrine of piercing the corporate veil is so well-established and so widely accepted by the courts that it has been used for decades to combat corporate fraud in ERISA cases. Peacock now asks this Court to turn back the clock by taking that weapon away from the funds and relegating them to the vagaries of state litigation. Such action not only would be contrary to the policy of ERISA, but would be unfair to those that Congress expressly sought to protect.

V. STATE LAW CANNOT GOVERN ERISA CASES IN WHICH THE DOCTRINE OF PIERCING THE CORPORATE VEIL IS INVOKED

A. Employer Delinquency Cases Must Be Litigated In Federal Court

Petitioner argues that piercing the corporate veil is a matter traditionally committed to the states, which are

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[19] A recent IPF experience illustrates the point. On July 20, 1993, the IPF obtained a judgment against two companies, Shared Management Group, Ltd. and Division 4 Masonry Inc., both of which thereafter closed their doors. IPF subsequently obtained documents that revealed a "silent partner," Robert Sansone, who was the sole shareholder of the companies. In the IPF's asset discovery of the defunct companies, it was learned that neither company had followed the corporate formalities, such as holding annual meetings of the directors and shareholders. In addition, Sansone borrowed money from each corporation without appropriate loan documentation. While insolvent, the corporations repaid money to several of its "investors" who were associated with Sansone. A new action thereafter was filed by the IPF, this time naming Sansone as a defendant and seeking recovery under the doctrine of piercing the corporate veil. Following Sansone's deposition, the matter was resolved by Sansone's payment of the full contributions owed by the defunct corporations. *Joyce v. Shared Management*, Civ. No. 93-0974 (D.D.C. filed May 11, 1993); *Joyce v. Sansone*, Civ. No. 94-02137 (D.D.C. filed Oct. 4, 1994).

competent to adjudicate such issues. (Pet. Br. 25-28). But, at least as to the collection of employer delinquencies under 29 U.S.C. § 1132(g)(2) of ERISA, the states lack jurisdiction to do so. 29 U.S.C. § 1132(e)(1) provides in pertinent part:

> Except for actions under subsection (a)(1)(B) of the section [actions by beneficiaries], the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by . . . a fiduciary . . . .

If Petitioner is correct that state courts alone may employ the doctrine of piercing the corporate veil in ERISA cases, then individuals who defraud fund beneficiaries will be immune from prosecution under ERISA or state law, because federal jurisdiction is exclusive. When Congress has so clearly expressed its desire to protect those beneficiaries by putting "teeth" in the statute, it would be anomalous to provide fewer rights and protections for those beneficiaries than for everyone else.

B. Federal Jurisdiction Over ERISA Actions For Collection Of Employer Delinquencies Is Exclusive And State Law Is Preempted

Peacock asserts that state veil piercing laws are not preempted by ERISA because they do not "relate to" an employee benefit plan. (Pet. Br. 21-25.) To support this theory, Petitioner points out that the Tru-Tech plan is "long gone," such that the amended complaint cannot relate to ERISA. (Pet. Br. 22.)

Petitioner's contention that ERISA has disappeared from this case is simply wrong. Although it is true that Peacock's scheme to siphon off corporate assets for his own benefit was well disguised and necessitated a second legal action, this does not alter the fact that the second action remained an ERISA collection action brought to recover for damages to plan beneficiaries. Had Thomas been aware of Peacock's misdeeds at the time the first suit was

filed, he would have named Peacock as a defendant, *not* as a fiduciary, but as a person who *was* the corporation under the doctrine of piercing the corporate veil.[20] Given the success of Peacock's scheme, Thomas was entitled to name him as a defendant in the second action and seek relief, under the federal common law doctrine of piercing the corporate veil, for the ERISA contributions owed by his corporation.

Under Peacock's theory, the availability of the veil piercing doctrine in an ERISA case would turn on the timing of corporate machinations. Thus, Peacock asserted below that Thomas could and should have made his veil piercing contention when he filed his first complaint, even though Peacock had then yet to embark on his nefarious "corporate strategy" to avoid his company's ERISA obligations. *Thomas,* 39 F.3d at 503 n.14. In the same breath (using the Catch-22 approach that also drives his preemption argument), Peacock contends that because he manipulated and abused the corporate form *after* the initial judgment had been entered and Peacock found (on the then known facts) not to be a fiduciary, ERISA prevents Thomas from relying on a veil piercing doctrine to enforce the judgment against Peacock.

Two responses are in order. First, the availability of the doctrine cannot turn on the timing of the corporate scheme, if only because such a rule would reward those who lie in the weeds (or conceal their strategy) until after a judgment is entered. Second, that Peacock was found not to be a fiduciary in the first phase of the litigation is irrelevant for, as *Mertens* recognizes, persons otherwise not liable under ERISA, may "become liable for damages" whenever they "cross the line" drawn by ERISA between non-fiduciaries and fiduciaries by engag-

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[20] Indeed, Peacock claimed below that Thomas should have and (more importantly for present purposes) could have, named Peacock as a defendant under a veil piercing theory in his initial complaint. *See Thomas,* 39 F.3d at 503 n.14.

ing in conduct that brings them within the reach of the statute. 113 S. Ct. at 2071-72.[21] Here, of course, Peacock "crossed the line" when he abused Tru-Tech's corporate form and stepped into the corporation's shoes. Then (but only then) could it be said that Peacock "simply *is* the corporation." *Massachusetts Laborers'*, 845 F.2d at 24 (emphasis in original). *See also Thomas*, 39 F.3d at 502 n.11.

Finally, Thomas' second action against Peacock in any event had to be brought in federal court. That is so because it "relates to" an employee benefit plan, as it sought to recover damages awarded under ERISA for breach of fiduciary duty by Peacock's corporation. 29 U.S.C. § 1109. In these circumstances, where the beneficiaries sought to pierce the veil and impose that liability on Peacock, state corporate law is preempted and federal common law must govern.[22]

C. Relegating These Actions To State Court Would Deny The IPF And Other Funds Important Procedural Safeguards

Peacock contends that a rule requiring veil piercing actions to be brought in state court would in no way

[21] *Compare Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co.*, 884 F.2d 288 (7th Cir. 1989) (broker who followed investment adviser's instructions in executing transactions is not a fiduciary) *with Olson v. E.F. Hutton & Co.*, 957 F.2d 622, 626 (8th Cir. 1992) (broker whose advice served as a primary basis for investment decisions was a fiduciary).

[22] The statement in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 833 (1988), that "ERISA does not provide an enforcement mechanism for collecting judgments won" does not change this result. As the Fourth Circuit held (*Thomas*, 39 F.3d at 502), *Mackey* would only be relevant if this were an action to execute on the judgment Thomas won below (by way of garnishment of Peacock's wages, for example, as was the case in *Mackey*). But that enforcement action is yet to come, and will only take place if this Court affirms the judgment. Until this Court does so, there is no final judgment against Peacock to "collect" or "enforce." *See Thomas*, 39 F.3d at 503.

thwart uniformity or undermine any other ERISA policy. (Pet. Br. 25-28.) However, every court presented with the question has reached the contrary result, concluding that ERISA mandates a federal common law of veil piercing. *See* cases cited in Part III, *supra*.

Additionally, it is important to recognize that the rule Peacock advocates would operate to the severe detriment of plans such as the IPF. Since 29 U.S.C. § 1132(e)(2) allows ERISA actions to be brought where the plan is "administered," the IPF can bring suit against any of its thousands of participating employers in Washington, D.C., and can effect nationwide service of process to obtain jurisdiction over them there. The provision confers at least two substantial benefits on the IPF. First, there is the saving realized by suing in one jurisdiction through one counsel, as opposed to retaining counsel throughout the United States. Indeed, delinquencies can be handled on an "assembly line" basis, reducing costs to the plan. Second, § 1132(a)(2) affords a significant tactical advantage to plans like the IPF. A California employer sued in Washington, D.C. is much more likely to settle the matter than if the litigation were brought in its home district. This ERISA provision therefore produces both savings and tactical benefits.

If Peacock's proposal were adopted, every ERISA delinquency case in which it is necessary to "pierce the corporate veil" would be litigated at least in two stages in two forums, and under both state and federal law. In the first phase, suit would be brought and decided under federal law in the federal court where the plan is administered, just as are the many other delinquency suits instituted by the fund. In the second phase, suit would have to be brought (says Peacock) in the state court located in the employer's home district, under state law rather than federal common law, to obtain a judgment from the person hiding behind the corporate veil. We submit that there is no basis for allowing delinquent em-

ployers, who have cheated their employees out of contribution payments, to enjoy procedural benefits and require funds to engage in costly nationwide litigation, particularly at the expense of advantages now enjoyed by ERISA plans.

CONCLUSION

The court of appeals should be affirmed.

Respectfully submitted,

IRA R. MITZNER
Counsel of Record
WOODY N. PETERSON
CARLA M. MARCOLIN
DICKSTEIN, SHAPIRO & MORIN, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700
Attorneys for Amicus Curiae Bricklayers & Trowel Trades International Pension Fund

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